H. Morgan Esq. with the Lecturer's Compliments

No. 1.

LAW LECTURES.

SUBJECTS:

TORTS AND NEGLIGENCE,

DELIVERED BEFORE THE

LAW STUDENTS OF TORONTO,

AT

OSGOODE HALL.

BY

JOSEPH E. McDOUGALL, Esq.,
BARRISTER-AT-LAW,
EXAMINER OF THE LAW SOCIETY ON CRIMINAL LAW AND TORTS.

REPORTED AND PUBLISHED BY

J. P. MABEE, Esq.,
STUDENT-AT-LAW.

JANUARY, 1882.

TORONTO:
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INTRODUCTION.

I may say that the publication of these lectures was an idea entirely of my own, and that at the time the earlier ones were delivered, the learned lecturer entertained no intention of putting them in print, and prepared the same voluntarily at the request of the Osgoode Literary and Legal Society for the benefit of those who were so fortunate as to be able to hear them. I do not know that I can better define the respective positions of Mr. McDougall and myself in connection with this work than by publishing in lieu of a preface a letter received from him, under date December 15th:—

MY DEAR MABEE,—I enclose you proof of the first lecture I delivered to the students under the auspices of the Osgoode Literary and Legal Society, having made some verbal and typographical corrections. The short-hand report taken by you is, I think, a faithful transcript of the lecture I delivered.

I need hardly say to you that, although I have given my consent to the publication by you of this and other lectures I have delivered, and propose to deliver, on Torts and Negligence, I do not claim any originality in the text or material of the lectures. Prepared as they have been, in the midst of the duties demanded of a busy professional man, all I have been able, or even attempted to do, has been to select freely from well-known text writers, and leading decisions in the reports, such enunciation of the various principles as would, in the course of a short series

of lectures, stimulate the enquiring minds amongst my audience to explore more closely the wide fields of information lying before them.

The reference to leading cases in the English, Canadian, and American Reports will give, I trust, a more than passing value to your publication, and I observe with pleasure that in your industrious preparation of the text, you have thoughtfully added a number of cases to those cited by me.

Wishing you every success, and trusting that the lectures may prove of some value to the students for whose benefit they have been delivered, and the venture no pecuniary loss to yourself,

I remain,
Yours sincerely,
JOSEPH E. McDOUGALL.

I may add that I have endeavoured, in extending the list of cases, to select those bearing most nearly on the points discussed, and hope the publication may meet with the approval of the students, for the furtherance of whose interests they now appear. It is my intention to publish the series of lectures already delivered, and intended to be delivered, by Mr. McDougall on the subject of Negligence this winter—the lecture on Torts, being merely an introductory one. These lectures, when completed, will make a small volume, which it is hoped will materially assist every student who may possess it in the preparation of his work for the Intermediate and Final Examinations.

J. P. MABEE.

TORTS.

FIRST LECTURE.

According to Mr. Addison two things must combine or concur to constitute a tort: 1st, actual or legal damage to the plaintiff, or the person in whose shoes the plaintiff stands; 2nd, a wrongful act committed by the defendant.

It is a well known and ancient maxim that wherever there is a wrong there is a remedy; and wherever a right is invaded or infringed, even though the damage be purely nominal, an action will lie. The maxim *de minimis non curat lex* is not applicable in actions of tort, for ever since the celebrated case of *Ashby* v. *White*, 1 Smith's Leading Cases, 265, 8th. ed., the opinion of Lord Holt, expressed in his judgment delivered in that case, has been accepted as sound law. This celebrated judgment was a dissenting one, in which the learned Judge differed from all the other members of his Court, but he was subsequently upheld by the House of Lords by a majority of fifty to sixteen, and ever since the date of that decision, it has been a recognized doctrine of the law of both England and America. From the time of the final decision of this case down to the present day the Courts both in England and on this continent have acted upon the principle, and carried it out in their judgments, that where there is a legal injury, there is a damage in law; and even though this damage be not actual, still an action will lie, for the law implies a legal damage from the infringement of such a right. Lord Holt says in his judgment, that it is impossible to imagine any such thing as *injuria sine damno*, as every injury imports a damage in the creation of it. Still there may be both *injury* and *damage*, as the result of an act, and yet no right of action,

for where no legal right has been invaded, no action will lie, however great the damage; but, on the other hand, the invariable rule has been, that when a legal right has been invaded, a right of action accrues to the plaintiff, even though no injury has resulted to him from such invasion.

The decision in *Ashby* v. *White*, as described in the head note was, that "a man, who has a right to vote at an election for members of Parliament, may maintain an action against the returning officer, for refusing to admit his vote, though his right was never determined in Parliament, and though the persons for whom he offered his vote were elected;" and, as I have mentioned, this was the conclusion of the House of Lords. Since then the maxim before alluded to has never been questioned. See also *Perring* v. *Harris*, 2 Moo. & Rob. 5, where an action was held maintainable against an overseer for omitting a parishioner's name from the roll *per quod*, she was unable to obtain a beer license. In *Mason* v. *Paynter*, 1 Q. B. 974, the plaintiff recovered against the sheriff for delay in the execution of a writ, *per quod* the plaintiff incurred costs that he could have avoided had the sheriff used more diligence. In *Barry* v. *Arnaud*, 10 A. & E. 646, an action was held to be well founded, where a customs officer refused to sign a bill of entry without payment of an excessive duty. That an action lies, by one who is legally entitled to vote, against an inspector or returning officer who improperly refuses to receive his ballot, see also *Green* v. *Shumway*, 39 N. Y. 418; *Goetcheus* v. *Matthewson*, 61 N. Y. 420; *Bernier* v. *Russell*, 89 Ills. 60; *Huber* v, *Riley*, 53 Penn. St. R. 112; *Carter* v. *Harrison* 5 Blackford (Ind. 138).

In *Davis* v. *Black*, 1 Q. B. 900, the plaintiff recovered a verdict against a clergyman for refusing to marry him. This was, however, set aside; but on the ground, that the declaration was bad in several respects, one of which was that it did not allege that the lady, whom the plaintiff was desirous of marrying, had made any request or signified her consent to the defendant in any way to the proposed ceremony, it was remarked by Lord Denman, in his judg-

ment in this case, that, on proper pleadings, the action would have been well laid and maintainable.

To show that our own Courts, by express decisions, have affirmed the doctrine laid down in *Ashby* v. *White*, I need only cite a few cases. The first is that of *Mitchell* v. *Barry*, 26 U. C. Q. B. 416. The plaintiff in this case declared that he was entitled to the water of a certain stream for working his mill, and complained that the defendant, owning higher up, had unlawfully deposited sawdust, bark, slabs, etc., in the stream, which were carried down and choked up the plaintiff's mill pond and races; the defendant, by his second plea, denied the plaintiff's right to the water, which the plaintiff sufficiently proved, but there being no appreciable damage, the jury found a general verdict for the defendant; it was held that there must be a new trial, for the right being established, the deposit of the saw-dust and other refuse was an injury to it for which the plaintiff was entitled to a verdict.

Another case is that of *Plumb* v. *McGannon*, 32 U. C. Q. B. 8. In connection with a deed of certain land, one O'Connor conveyed, as appurtenant to the land, a full, free, and unrestrained right of way in, over, upon, and along, and to use as a public highway or street, a certain strip of land twenty feet wide, adjoining the westerly side of the said parcel of land, extending from a highway to the edge of the water in the river St. Lawrence, at all times and seasons for ever. In an action for obstructing the plaintiff's right of way, (although it was held to be a merely private right,) by erecting a boat-house covering almost ten feet out of the twenty, partly above high water mark, it was held that the obstruction without actual damage gave the grantee a cause of action, for it was an interference with his easement, which if submitted to would of itself become a right against him. Again, in *Warren* v. *Deslippes*, 33 U. C. Q. B. 59, where in trespass the defendant justified cutting the ditch complained of under an award of fence viewers, the jury found a verdict for the defendant on this issue, and on the general issue that there was no damage.

Held, that as a right was invaded, the plaintiff was entitled to recover nominal damages on the general issue. From these cases you will see, that in our Courts no doctrine is established more clearly, than that whenever any legal right is invaded, an action will lie therefor, even though no actual damage results from the breach of duty, or wrongful act of the defendant.

Now, what must we understand the expression *legal injury* to mean? It has been described by a celebrated English Judge, Wells, C. J., as a *tortious act;* but, upon reading the cases, and considering some instances that one can readily suppose, this definition can hardly be said to be satisfactory. Suppose A. suffers a building owned by him upon a public street, or adjoining the premises of another, to fall into decay, and to become, though originally strong, weak, and ruinous through lack of repair, and that the building falls upon B., while passing along the public street, and injures him; or, if it falls upon his house, or any property in the immediate neighborhood, and injures it, a legal injury is thereby inflicted upon B., for which an action will lie against A., and that injury is as much a tort as though it had resulted from the direct act of A. Again, if a railway carriage, through defective construction or defective materials, breaks down and injures a person lawfully riding therein, the company are liable to the passenger in damages for such injury, if it could have been prevented by the exercise of any reasonable care or foresight; and the omission to make a careful inspection of the carriage, and the materials, used in the construction thereof, is, in law, a tort. So we see that the omission to do any act, which it is a duty to perform, as well as the commission of any act, which prejudicially affects the legal right of another, are both of them torts, and we might therefore define legal injury to be, *the doing of a tortious act, or the omission to perform a duty, whereby damage is occasioned, actual or nominal, or, by such act or omission, a legal right is invaded.* See *Price* v. *Belcher*, 4 C. B. 866; *Iveson* v. *Moore*, 1 Ld. Raym. 486. The most common class of cases

in which damage frequently arises from omitting to perform duties, are those against municipal corporations for neglecting to repair highways, some injury being the result; and there may be, perhaps, this distinction noted, that wherever the injury occurs from the omission to do a particular duty, some damage must be shown, to entitle the plaintiff to recover; while, as we have seen, the positive commission of a tortious act, whereby a legal right is invaded, is actionable, even though no appreciable damage can be proven.

Now, we also find, that as to a very large class of actionable torts, it is of no importance as to what motive may have actuated the *tort-feasor*, for every person is bound, at his peril, to so conduct himself, and to so use and manage his property, as not to infringe the rights of another, and, failing in this, the motive which caused the particular deed or omission, will not free him from liability. We can illustrate this by a very common class of torts, viz.: *Nuisances* —A man may have no ill will or motive to cause his neighbour damage, yet if he have, or carry on any particular trade or business, which, by reason of the manner it is conducted, becomes in law a nuisance, he will be liable to whoever can show damages.

So, too, if you should turn suddenly around and knock a man down without intending it, you would be responsible for the injury you did him, yet on the other hand, a man may sustain very serious and heavy damage, in consequence of the act of another, and still that other will not be responsible, because, if the damage be the result of inevitable accident, or a lawful act, done in a lawful manner, without carelessness, unskilfulness, or negligence, there is no legal injury, and therefore no tort for which an action is maintainable. The common illustration given is that of an accident or an act which was inevitable, as in the case of a squib thrown lighted into a coach full of passengers, and by some passenger liable to be damaged thereby, flung out in self-preservation, when it falls against a bystander and explodes, whereby such bystander is seriously injured; the person

throwing out the squib is not responsible in damages, for he has done no wrong, although on the other hand the person who first set the squib in motion would be responsible for the ultimate injury caused by it, even if it had been thrown from one to another by twenty different persons to protect themselves; for the person setting a dangerous thing in motion is answerable for the injury it occasions, and in this case the probable and natural result, which might have been expected from throwing so dangerous a thing as a squib, amongst a crowd of people, is, that some one or more of them would be more or less injured thereby. See *Scott* v. *Shepherd*, 2 W. Bl., 894, 3 Wils. 403. It would seem that this doctrine is founded on the old maxim that, "self-preservation is the first law of nature," and that where two or more persons are apparently about to be subjected to the same damage or violence, each one is justified in using any means that lies in his power to protect himself.

To illustrate another kind of injury which, may occur by reason of the act of another, yet for which no action lies, Every man is entitled to have the soil of his neighbor's land support his own, so that if I, digging close to the boundary of my neighbour's land, make a pit, and that, by reason of my so digging, a portion of my neighbor's land, being deprived of its lateral support, slides into the pit, I am liable in damages; but if my neighbour build a house close up to the boundary, and I excavate on my land close up to it, so long as I leave support enough for the weight of the soil, without the additional weight of the building, I am not responsible should the artificial weight, placed on the soil, be too much for the ground, and the building be wrecked, because I am ent tled to use and enjoy the soil of my freehold, and excavate in it, so long as I do not disturb the integrity of my neighbor's land, and I am not responsible if he loads it with an artificial weight. So that, if by exercising the right I am entitled to, and enjoying it no more than is my privilege, his land becomes incapable of supporting this additional burden with which he has encumbered it, an injury follows, I am not responsible.

See *Wilde* v. *Minsterley*, 2 Rolles' Abr. 564; *Wyatt* v. *Harrison*, 3 B. & Ad. 871.

Again another class of torts, which may result in injury, are not actionable, because the damage is too remote; or in other words, if the wrong would not have been followed by damage, if other circumstances had not intervened for which the defendant is not responsible, and which are not the direct and unavoidable result of such wrongful act, the damage is said to be not the proximate result of the wrong, and the wrong-doer may not be liable.

Upon the question here opened up as to what rules can be laid down for deciding in what cases the damages are too remote, a small treatise might be written. The subject is one of great practical importance, and, with your permission, I will briefly discuss it, calling your attention to a few cases in our Courts which will enable us perhaps to gather some hints for our guidance, in deciding a few of the cases, coming under our almost everyday notice.

Mr. Addison says: "The general rule of law is, that whoever does an illegal or wrongful act is answerable for all the consequences that ensue in the ordinary and natural course of events, though these consequences be immediately and directly brought about by the intervening agency of others, providing the intervening agents were set in motion by the primary wrong-doer, or providing the acts causing the damage were the necessary, or legal and natural consequences of the original wrongful act." A commonly mentioned instance is, where the defendant picked up a pick-axe, and pursued a boy who ran into a wine shop for safety and upset a cask of wine, the defendant was liable for the loss. (*Vandenburgh* v. *Truax*, 4 Denio. U. S. R. 464.) Or, if I strike a horse, upon which one of you is riding, and he runs away, running against and injuring a man lawfully on the highway, I am liable, and not the rider of the horse. (*Gibbons* v. *Pepper*, 1 Ld. Raym. 38.) One of the most interesting cases, in our own reports, on this subject of proximate danger is that of *Toms* v. *Whitby*, reported in 35 U. C. Q. B. 195. That was an action in which the

plaintiffs, husband and wife, sued the defendants, the Corporation of the Township of Whitby, for the injury alleged to have been caused to the wife for their neglect to have a railing, or guard along an embankment leading down to a bridge on a prominent highway, in a populous township. It appeared that the wife and her son, about eight years old, were crossing the road in a buggy, when the horse shied at some new planks in the bridge, and backed to the end of it, when the back wheels went over the bank, throwing her out and down into the water, about fourteen feet below. The jury found on the evidence, that the road was not in a sufficiently safe state, and that the wife was guilty of no negligence in the management of the horse. The questions left to the jury were, 1st, whether the road was in a sufficiently safe state? 2nd, was Mrs. Toms, or were she and the boy together, reasonably fit and competent to drive the horse along the road? 3rd, was Mrs. Toms, or were she and the boy, guilty of negligence in managing the horse at the time of the accident, so that their mismanagement was the occasion and the proximate cause of the injury, so that, but for such negligence, the injury would not have happened? 4th, If these questions were found for the plaintiffs, what damages should be given? The verdict was for $2500. Now, there were three principal events here, (1) The fright of the horse, (2) Its backing or becoming unmanageable, (3) The absence of a fence or railing along the embankment, or the backing off it. The plaintiffs contended that the proximate cause of the injury was the want of a fence; and the defendants said it was the ungovernable conduct of the horse, no matter how caused, whether by accident, misfortune, or otherwise, that the accident was attributable. The Court held, Morrison, J., doubting, that the proximate cause was the absence of the fence, and they sustained the verdict. Among the cases in support of the plaintiff's view, commented on by one of the learned Judges, was *Burrows* v. *The March Gas and Coke Co.*, 39 L. J. Ex. 33, and, as it is an admirable illustration of the point we are discussing, as showing the principles applied, I will

mention what the facts in that case were. It was agreed between the plaintiff, and the defendants, that defendants should supply the plaintiff with a service pipe from their main to his meter. The service pipe leaked. The plaintiff employed a gas-fitter to lay down pipes from the meter over his premises. This gas-fitter *negligently* took a lighted candle to search for the leak. An explosion took place, which damaged the plaintiff's property. It was held that the plaintiff was not answerable for the gas-fitter's negligence, as he was an independent workman, so the plaintiff did not contribute to the accident; and that the injury arose from the defective service pipe, which had been before laid down by the defendants, as well as from the gas-fitter's negligence, and that both the latter and the defendants were answerable to the plaintiff. The defective pipe was said to have been the proximate cause of the damage in the suit against the Gas Co., and it follows, from the gas-fitter being also liable, that the proximate cause, so far as he was concerned, as between him and the plaintiff, was his act of negligence in using the lighted candle.

The defective pipe was the primary, but not strictly the proximate cause, which was the next immediate event before the explosion; but the Court determined that, so far as the Gas Co. was concerned, the defective service pipe, they had laid down, was the proximate cause.

Now, as in Canada, we are frequently brought into contact with frost, snow, and ice, I will refer you to a couple of cases, in which Jack Frost was the proximate cause of the troubles which followed, in one of which, in consequence of his impersonality, no person was held responsible, and in the other a railway company were forced to foot the bill. In the first case the defendant washed his van in a public street, contrary to the provision of the Police Act, 2 & 3 Vict. c. 47, s. 54, and allowed the waste water to run down the gutter, towards the grating, leading to the sewer, about twenty-five yards off. In consequence of the extreme severity of the weather, the grating was obstructed by ice, and the water flowed over a portion of

the causeway, which was badly paved and uneven, and there froze. There was no evidence that the defendant knew of the grating being obstructed. The plaintiff's horse, while being led past the spot, slipped upon the ice and broke its leg. In giving judgment in the action brought in respect of this damage C. J. Bovill reasoned out the question of responsibility as follows: "No doubt one who commits a wrongful act is responsible for the ordinary consequences which are likely to result therefrom; but where there is no reason to expect it, and no knowledge in the person doing the wrongful act, that such a state of things exist as to render the damage probable, if injury does result to a third party, it is generally considered that the wrongful act is not the proximate cause of the injury, so as to render the wrongdoers liable to an action. If the drain had not been stopped, and the road had been in a proper state of repair, the water would have passed away without doing any mischief to any one. Can it then be said to have been the ordinary and probable consequence of the defendant's act, that the water should have frozen over so large a portion of the street as to occasion a dangerous nuisance? I think not. There was no distinct evidence to show the cause of the stoppage of the sink or drain, or that the defendant knew it was stopped. He had the right, then, to expect the water would flow down the gutter to the sewer in the ordinary course, and, but for the stoppage, for which the defendant is not responsible, no damage would have been done," and accordingly judgment was given for the defendant. *Sharp* v. *Powell*, L. R. 7 C. P. 253.

Now my other frost case came to a different conclusion, as I have said. There the water, which had trickled down a waste pipe at a railway station on to the platform, had become frozen. The plaintiff, a passenger, stepped upon it, fell, and was injured, and the Court held the defendants, the railway company, liable, on the ground, that the non-removal of a *dangerous nuisance* like ice, from their premises, was the proximate cause of the injury: *Shep-*

herd v. *Midland R. W. Co.*, 25 L. T. N. S. 879; 20 Weekly Reporter 705. See also, *The George and Richard*, L. R. 3 A. & E. 466.

I now propose to revert for a moment to the principle, I have before drawn your attention to, that wherever a legal right is invaded, nominal damages may be recovered, even though no actual damage be sustained; and, for the purpose of illustration, will give you a few instances of its application.

Every unauthorized interference by a man with the goods and chattels of another, or his personal property, constitutes a tort, and gives rise to a cause of action, although no pecuniary damage may result. If one of you have a certificate of good character, and I write improperly on it, so as to deface it, or otherwise alter its meaning, I am guilty of a tort, and liable to an action, and this though you can prove no pecuniary damage.

Again, as Lord Holt puts it, if a man gets a cuff on the ear from another, though it cost him nothing, yet he shall have his action for it as a personal damage. So a mere trespass is actionable. If I ride over your ground, though no pecuniary damage is done, yet it is an invasion of your property; and, although the damage in this case is imperceptible, yet if I repeat my trespass after being warned or forbidden to do so, you may recover exemplary damages against me for my persistent wrong-doing. See *Sears* v. *Lyons*, 2 Stark. 318; *Merest* v. *Hervey*, 5 Taunt. 441.

In the American notes to a leading text book I find the following interesting case, where the principle above commented on, is fully sustained and enforced.

The plaintiff brought an action for an injunction to restrain the defendant, who carried on the business of slaughtering cattle, near their premises, from discharging the blood and refuse of the cattle killed there, into a stream that flowed through the plaintiff's premises, or from in any manner polluting the water of the stream.

The defendants insisted that they did not discharge the refuse from their works into the stream, and that the

stream was given over to secondary uses, before their works were established there (meaning by this that the stream was given over to other than the ordinary uses of a stream, as fishing, drinking, &c.); or that the the plaintiff, by acquiescing in its being used for these extraordinary purposes, had lost their usual prescriptive right. The Court submitted the question to the jury, with instructions to find whether the stream had previously been given over to secondary uses, and, if so, whether the defendants appreciably increased the pollution, and, if they found in the affirmative, to say what damage the plaintiff sustained therefrom. The jury found that the stream had previously been given over to secondary uses, that the defendants appreciably increased the pollution, but that the *plaintiffs sustained no damage therefrom;* it was held under this verdict that the plaintiff was entitled to nominal damages. (*Orphan Asylum* v. *Schwaltz*, N. Y. Circuit, 1875, tried before Westbrook, J.)

So the refusal of a banker to pay the cheque of his customer, he having in his hands sufficient funds of the customer therefor at the time, is a wrongful act, and being injurious to the credit of the customer, entitles him to recover substantial damage, even though no actual damage can be proved at the trial: *Marzetti* v. *Williams*, 1 B. & Ad. 415; *Rolin* v. *Steward*, 14 C. B, 595.

We have now run over briefly the main incidents which characterize a tort, and I have endeavored, and I hope not without some success, to show you some of the most important variations of liability, and a few of the principles which govern the Courts in estimating the damage, or deciding upon the question as to when a wrong is actionable, and we have seen as well, that a most serious damage and injury may be sustained, and yet no cause of action arise. I now purpose briefly to discuss the salient distinctions between *public* and *private wrongs*, and incidentally, what limitation is imposed upon a sufferer, in pursuing his legal remedies, in a civil Court, when the injury committed amounts under our criminal code to a crime.

The distinction between public wrongs and private, of crimes and misdemeanors, from civil injuries, seems principally to consist in this: private wrongs, or civil injuries, are an infringement or privation of the civil rights, which belong to individuals, *considered merely as individuals;* public wrongs, or crimes and misdemeanors, are breaches and violation of the public rights and duties due to the whole community, *considered as a community,* in its social aggregate capacity. If I detain a field from another man, to which the law has given him a right, this is a civil injury and not a crime, for here only the right of an individual is concerned, and it is immaterial to the public which of us is in possession of the land; but treason, murder, and robbery are properly ranked amongst crimes, since besides the injury done individuals, they strike at the very existence of society, which cannot possibly exist where actions of this sort are permitted to pass unquestioned.

In all cases the crime includes an injury. Every public offence is also a private wrong, and something more: it affects the individual, and it also affects the community. For example, treason in imagining the Queen's death involves in it conspiracy against an individual, which is also a civil injury, but as this species of treason, in its consequence, principally tends to the dissolution of government, and the destruction thereby of order and peace of society, this constitutes a crime of the highest magnitude. Murder is an injury of the most extreme kind to an individual, but the law of society considers principally the loss which the state sustains by being deprived of a member, and the dangerous and pernicious example set others, and consequently we have the most extreme punishment known to the law the result of such an act.

Robbery may be considered in the same way. It is an injury to private property, but were that all, a civil action and damages might be a sufficient remedy, but the public mischief of such an act is what our criminal law provides for in making robbery an offence of so serious a nature, and providing therefor such exemplary punishment.

We will observe, then, that the distinction between public crimes, and private injuries, seems to be created by *positive* laws. Every violation of a moral law or natural obligation is an injury, for which the offender ought to make retribution to the individuals, who immediately suffer from it, and when it also amounts to a crime, he ought to be punished to the extent that would deter both him and others from repeating the offence.

In positive law these acts are called *injuries* for which the Legislature has only retribution, or compensation in damages, but, when from experience it is discovered that this is not sufficient to restrain, within moderate bounds, certain classes of injuries, it then becomes necessary for the legislative power to create them crimes, thereby endeavoring to repress them by the terror of punishment.

The word *crime* then has a technical meaning in our law. It would appear to have reference to those acts, which, by positive law or enactment, the commission of them, subjects the offender to punishment. You often hear the expression *high crime*, the word *high* has no signification, except to give greater solemnity to the charge.

Now the public remedy for torts is generally by *indictment*, or by suit at the relation of the Attorney-General as representing the public. It is often a matter of extreme nicety and difficulty to decide in what cases, injuries amounting to public wrongs, are actionable by an individual. The general rule may perhaps be stated to be, that if the individual suffers any special injury, different in kind from that suffered by the general public, such individual will have his separate right of action for compensation in damages.

The best way I can show you, how this rule is applied, is perhaps by giving you a few examples. Suppose a highway obstructed so as to impede the passage of the general public, the remedy would be by indictment, but if some particular individual was injured in some way beyond that sustained by the general public, as by being delayed in making a journey of importance, or compelled to take a

circuitous course, or drive against the obstruction on a dark night, he could sue for the individual injury: *Mott* v. *Schoolbred*, 13 Eng. Rep. 582; *Fort Plain, &c.*, v. *Smith*, 30 N. Y. 62; *McDonald* v. *English*, 85 Ills. 232.

In one case the plaintiff was navigating a public navigable river with goods, and he was impeded in his progress by a vessel, which the defendant had wrongfully moored across the stream, and the plaintiff, in consequence of the obstruction, was compelled to unload his barge, and carry his goods by land to their destination. It was held that the plaintiff was entitled from the defendant all the expenses of the land carriage of his merchandize: *Rose* v. *Miles*, 4 M. & S. 101.

Another case was as follows: The plaintiff brought his action for damages occasioned by an obstruction in a public tidal river. The declaration set out that he carried on the business of an innkeeper in a house abutting on the river, and that the defendant placed beams and spars in the water, which floated backwards and forwards with the tide, and obstructed the access to the plaintiff's house at certain periods, whereby the plaintiff's customers were prevented from coming to his house for refreshments; and it was held that this was specific damage to the plaintiff, resulting from the public nuisance which entitled him to an action for damages: *Rose* v. *Groves*, 5 M. & G. 613; see *Hadley* v. *Taylor*, L. R. 1 C. P. 53; *Benjamin* v. *Storr*, L. R. 9 C. P. 400, 10 Eng. Rep. 231.

Whenever a tort amounts to a felony, the remedy for the tort or civil wrong is postponed or suspended, until the requirements of public justice have been satisfied by the prosecution of the offender, and, after the party upon whom suspicion has fixed has been convicted, or acquitted, without collusion, the prosecutor may support an action for the same cause as that on which the criminal prosecution was founded. What is meant then by the expression, that a trespass merges in a felony, is that all redress by action for the private injury is suspended, until the criminal law has been put in force. As Mr. Addison says, it was never intended

to take away redress absolutely, after the ends of public justice were attained, but only to stimulate the party injured to bring the offender to trial for the public offence, and to prevent any compromise thereof.

We have, however, a law upon our statute books, with reference to personal injury, which somewhat invades this rule, enacting "that whenever the death of a person has been caused by such wrongful act, neglect, or default, as would, (if death had not resulted,) have entitled the party injured to maintain an action and recover damages in respect thereof, in such case the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death has *been caused under such circumstances as amount in law to a felony.*": R. S. O. ch. 128, sec. 2.

Section 3 of the same Act makes provision for whose benefit such an action would be for, viz.: "the wife, husband, parent, and child of the person whose death has been so caused," and it is to be brought by the executor, or administrator of the deceased.

Section 5 provides that only one action will lie for the same subject matter, and limits the time within which it may be brought to twelve months after the death of the deceased person.

NEGLIGENCE.

SECOND LECTURE.

Negligence, usually understood, is a word of exceedingly broad meaning. It would include almost every breach of duty not clearly intentional. Thus a man is said to neglect to pay his debts, to perform his contracts; and should the word be used in this sense it would cover a large field. This, however, is not the meaning applied to the word in law.

I think in correct legal phraseology *negligence* may be described as more nearly synonomous with *carelessness* than almost any other word.

It signifies primarily, the want of care, caution, attention, diligence, skill, or discretion in the performance of an act by one having no positive intention to injure the person complaining thereof.

When such intention exists, the act ceases to be merely negligent, and becomes one of violence or fraud; that is to say, if there is an *intention* to do the injury, it cannot merely be said to be negligent. The secondary meaning of negligence includes every omission to perform a duty imposed by law, for the avoidance of injury, to persons or property. The action of negligence, then, we may gather, proceeds from the idea of an obligation on the part of the defendant towards the plaintiff to use care, and a breach of that obligation to the plaintiff's injury. As a rule there must be affirmative proof of negligence on the part of the defendant to support an action, for where it is an even balance on the evidence, whether the injury has resulted from the want of proper care, on the one side or on the other, the party who founds his claim on the imputation

of negligence fails in his action. But in the case of accidents from machinery, where the accident is one which would not in all probability have happened had the person causing it used due care, and the actual machine giving rise to the damage is solely under the management of the defendant, it has been held that the mere occurrence of the accident is sufficient *prima facie* proof of negligence to impose upon the defendant the onus of rebutting it: *Scott* v. *London Dock Co.*, 34 L. J. Ex. 220; *Briggs* v. *Oliver*, 35 L. J. Ex. 163; *Czech* v. *General Steam Navigation Co.*, L. R. 3 C. P. 14.

The damage must be *proximately* caused by the negligence, and must not be the immediate result of any intervening negligence on the part of the plaintiff himself, for if the plaintiff's own negligence has directly conduced to the damage he has sustained, he is deemed to be the author of his own misfortune, and cannot therefore seek to make others responsible; consequently a plea of *contributory negligence*, in most cases, if proved, constitutes a good defence to such an action: *Grieve* v. *Ontario Steamboat Co.*, 4 C. P. 387; *Winckler* v. *Great Western R. W. Co.*, 18 C. P. 250; *McGunigal* v. *Grand Trunk R. W. Co.*, 33 Q. B. U. C. 194.

When a man hid £100 in some hay in an old nail-bag, and delivered it to a common carrier to be carried to London, and the money was lost, it was held that the common carrier was not responsible for the loss, as the consignor had neglected to inform the carrier of the value of the bag, and had thereby not enabled him to take proper care of it: *Gibbon* v. *Paynton*, 4 Burr, 2301.

If glass, china, or other frail articles requiring great care for their safe conveyance, are put carelessly into boxes, and delivered to a carrier for conveyance, without notice to him of their character, and are damaged in transit the carrier will not be bound to make good the loss, on account of the contributory negligence of the sender in concealing the peculiar nature of the articles, thus keeping from the knowledge of the carrier the additional care requisite to their safe conveyance.

Where, therefore, the *immediate* and *proximate* cause of the damage is the plaintiff's carelessness, or unskilfulness, he has no ground of action against the defendant, though the *primary* and *original* cause of damage is the defendant's wrongful act.

A case illustrating this point, and somewhat akin to *Toms* v. *Whitby*, referred to in my last lecture, but which terminated somewhat differently, is *Flower* v. *Adam*, 2 Taunt. 314. There some bricklayers, employed by the defendant, had wrongfully laid several barrowsful of lime and rubbish before the defendant's door, by the side of a highway, and while the plaintiff was passing in his carriage, the wind raised a whirlwind of this rubbish, which frightened the plaintiff's horse, and caused him to start to one side, in the direction of an approaching waggon; the plaintiff, to prevent the horse from running against the waggon, pulled him around sharply, when the horse ran over a lime heap before another man's door, broke the shaft by the shock, and the horse being then more frightened, ran away, upset the carriage, threw the plaintiff out and injured him, it was held that although the defendant was to blame for putting the rubbish by the side of the road, yet if the plaintiff's running against the second heap of rubbish, was owing to his pulling the horse around too sharply, the immediate cause of the injury was his own unskilfulness in the management of the horse, rather than the original wrongful act of the defendant: *Bush* v. *Steinman*, 1 Bos. & Pull. 408.

The case of *Sherwood* v. *The Corporation of Hamilton*, 37 U. C. Q. B. 410, is interesting and in point here. The plaintiff, with a waggon and load of bricks, was coming down a hill on the road by the side of a precipice. He had stopped to speak to some one, when on starting again the horses ran away, and, when they came to an opening in the fence or railing along the road, near the foot of the hill, they bolted through it and down the precipice. At the trial the plaintiff was nonsuited, on the ground that the proximate cause of the accident was the horses getting

beyond the plaintiff's control, not the defect in the fence; but, on an application for a new trial, it was held, that the mere fact of the horses running away and becoming unmanageable would not prevent the plaintiff from recovering, unless he had been guilty of want of reasonable care or skill, which was a question for the jury; and the nonsuit therefore was set aside. The rule as laid down in that case is as follows: Where two causes combine to produce the injury, both in their nature proximate, the one being the defect in the highway, and the other some occurrence for which neither party was responsible, the corporation is liable, provided the injury would not have been sustained but for the defect in the highway: *McIntyre* v. *Buchanan*, 14 U. C. Q. B. 581; *Bradley* v. *Brown*, 32 U. C. Q. B. 463; *Hutton* v. *Corporation of Windsor*, 34 U. C. Q. B. 487; *Price* v. *Cataraqui Bridge Co.*, 35 U. C. Q. B. 314; *Boyle* v. *The Corporation of Dundas*, 27 C. P. 129; *Burns* v. *The Corporation of Toronto*, 42 U. C. Q. B. 560; *Moore* v. *Inhabitants of Abbott*, 32 Maine, 46; *Farrar* v. *Inhabitants of Greene*, Ib. 574; *Coombs* v. *Inhabitants of Topsham*, 38 Maine, 204; *Anderson* v. *City of Bath*, 42 Maine, 346; *Moulton* v. *Inhabitants of Sanford*, 51 Maine, 127; *Winship* v. *Enfield*, 42 N. H. 197; *Clark* v. *Barrington*, 41 N. H. 44; *Tucker* v. *Henniker*, Ib. 317; *Norris* v. *Litchfield*, 35 N. H. 271; *Hunt* v. *Town of Pownal*, 9 Verm. 411; *Palmer* v. *Inhabitants of Andover*, 2 Cush. 600; *Rowell* v. *The City of Lowell*, 7 Gray, 100; *Davis* v. *Inhabitants of Dudley*, 4 Allen, 557; *Dreher* v. *Fitchburg*, 22 Wis. 675; *Houfe* v. *Town of Fulton*, 29 Wis. 296. In the latter case will be found a complete summary of the cases by Dixon, C. J., of the Supreme Court of Wisconsin: *Hull* v. *City of Kansas*, 54 Mo. 598, 14 Am. 487. A leading case in our own Court on this point is *Castor* v. *The Corporation of the Township of Uxbridge*, 39 U C. Q. B. 113. In this case telegraph poles, intended for the construction of a line, had been laid by a telegraph company upon the highway, encroaching upon the travelled portion. The plaintiff was being driven by

one F. along the road in a sulky, in the day time; they had passed several of the poles safely, but both were at the moment engrossed in conversation and looking at a man plowing by the roadside, and the sulky, running against a pole, upset and injured the plaintiff. It was proved that the path-master knew the poles were there. Held, that the driver was guilty of contributory negligence, and that the plaintiff therefore could not recover, although the defendants would otherwise have been liable: *Cornish* v. *The Toronto Street Ry. Co.*, 23 C. P. 355; *Hutton* v. *Corporation of Windsor*, 34 U. C. Q. B. 487. In *Holmes* v. *The Midland Ry.*, 35 U. C. Q. B. 253, the plaintiff was employed by the defendants to cut down the trees on his own land, within one hundred feet of the centre of the track, under the Railway Act, C. S. C. cap. 66, sub-sec. 14 of sec. 9; and he felled them lengthwise with the track, and left them lying there. In an action for damages for fire, caused by the defendant's locomotive, which extended to the plaintiff's land, it was held that, under the circumstances, the plaintiff was not guilty of contributory negligence in having left the trees felled by him on his own land: *Jaffrey* v. *The Toronto, Grey, and Bruce*, 24 C. P. 271. In *Nicholls* v. *The Great Western Ry. Co.*, 27 U. C. Q. B. 282, the driver of a cab, who disregarded the plaintiff's request to stop, was held to be the plaintiff's agent, and, an accident happening by reason of the driver's carelessness, the plaintiff nevertheless was held to have contributed to the accident, and not therefore entitled to recover.

In *Rastrick* v. *The Great Western R. W. Co.*, 27 U. C Q. B. 396, the jury were directed that if they were satisfied the accident would not have happened, if the defendants had erected proper fences, they should find for the plaintiff. Held a misdirection, for if the driver by his negligence contributed to the accident, so that, but for his want of reasonable care it would not have happened, the plaintiff could not succeed: *Winckler* v. *The Great Western R. W. Co.*, 18 C. P. 250; *Denny* v. *Montreal Telegraph Co.*, 42 U. C. Q. B. 577; *Bradley* v. *Brown*, 32 U. C. Q. B. 463. As

to the amount of negligence, or want of reasonable care, on the part of the plaintiff necessary to estop him from recovering, it has been laid down that it is not *any* negligence that will preclude him, but that though there has been negligence on the part of the plaintiff, still he may recover, unless the defendant could not, from the exercise of ordinary care, have avoided the consequence of the plaintiff's negligence; *Davies* v. *Mann*, 10 M. & W. 546; *Tuff* v. *Warman*, 2 C. B. N. S. 740.

In *Dowell* v, *The General Steam Navigation Co.*, 5 E. & B. 195, Lord Campbell says, "In some cases there may have been negligence on the part of the plaintiff remotely connected with the accident; and in those cases the question arises, whether the defendant by the exercise of ordinary care and skill might have avoided the accident, notwithstanding the negligence of the plaintiff, as in the often quoted *donkey case* of *Davies* v. *Mann*. There, although without the negligence of the plaintiff, the accident could not have happened, that negligence is not supposed to have contributed to the accident within the rule upon this subject; and, if the accident might have been avoided by the exercise of ordinary care and skill on the part of the defendant; to his gross negligence it is entirely ascribed, he and he only, proximately causing the loss."

In the case of *Lynch* v. *Nurdin*, 1 Q. B. 38, the defendant left his horse and cart for a long time unattended in the street, where some children were at play, and some of the boys got into the cart, and another led it on to give them a ride, and one of them fell off the shafts and got his leg crushed under the wheel; it was held that the defendant was responsible for the fall and the broken leg, and that the boy, in consequence of his tender years and natural instinct for play, could not be considered legally responsible for the damage he had sustained so as to preclude himself from recovering from the defendant. This case was afterwards, if not absolutely overruled, called very much into queston. When the defendant left the wooden covering of a cellar leaning against the wall, and the

plaintiff, a child of seven years old, got upon it in play, by the means of which it fell upon him and he was injured, it was held he could not recover: *Abbott* v. *Macfie*, 2 H. & C. 744. Negligence is not always necessarily culpable. There are many cases in which it might be desirable that a greater degree of care should be used than the case required, but it is only the lack of such care or diligence as the law demands in the particular case which constitutes culpable negligence; neither does the law make any unreasonable demands. It does not, as one writer remarks, require from any man superhuman wisdom or foresight. Therefore no one is guilty of culpable negligence by reason of failing to take precautions, which no other man would be likely to take under similar circumstances. If one use every precaution which the present state of science affords, and which any reasonable man would use, he is not held responsible for omitting other precautions, which might be conceived of, even though had he used them the injury would most surely have been avoided. A railway company is not liable for injuries caused by sparks from its locomotives, when it has used the most modern and approved of appliances to extinguish them, and kept a reasonable watch on its track; even though mischief might not have resulted had the company seen fit to keep an army of men along its line, for the purpose of suppressing any fire that might arise: *Vaughan* v. *Taff Vale R.W. Co.*, 3 H. & N. 743; and therefore it is held that all that can be required of a man is to use *reasonable* skill and diligence, and if he do this he is not responsible for failure.

In determining what constitutes negligence, regard must be had to the growth of science, and the great improvement in modern contrivances which takes place from day to day; many acts and omissions are now evidence of gross carelessness, which a few years ago, would not have been culpable at all, as many acts are now consistent with skill which in all probability, at some future day, will be considered the height of imprudence.

Thus, the introduction of the steam engine has made it

necessary that more care should be exercised in the management of horses in the vicinity of stations and crossings, or places where trains are likely to pass. The introduction of the safety lamp made it careless to enter a coal mine with an open candle, and the invention of improved tools, machinery and modes of working, has made it negligent to use old fashioned and more dangerous ones. A good instance of this doctrine is the case of *Cleveland* v. *Spier*, 16 C. B. N. S. 399. There the defendant's servant was employed in drilling a hole in the gas main in a public thoroughfare, using for the purpose a "diamond-point" chisel, which was proved by the plaintiff's witnesses to be more dangerous, though not an unusual mode of doing the work than by drilling or screening. The use of the "diamond-point" chisel causing particles of iron to fly off, and thereby endanger passers-by. It happened on this occasion, and a piece of metal entered the plaintiff's eye and injured him. It was held that the defendant was negligent in using the "diamond-point" chisel, when the accident might have been avoided by drilling, and he was compelled to pay the damage arising therefrom. Another interesting rule laid down in this case was, that a passer-by, who is casually appealed to by a workman for information respecting a thing which the latter is doing in a public thoroughfare, is not to be considered a "volunteer assistant," so as to exonerate the workman's master from responsibility for an injury resulting to the former, from the workman's negligent mode of doing the work.

Negligence of course is not actionable, unless it is the *proximate* cause of the injury complained of. As a leading text writer says: "The law cannot undertake to trace back the chain of causes indefinitely. Probably no injury ever happens for which less than a thousand people have a certain share of moral, if not legal responsibility. If a horse stumbles in the street, not only is the person who placed the obstruction there responsible for the consequences of his act, but in the light of moral reason, the city officers who neglected to remove the ob-

stacle; the appointing power which failed or neglected to secure careful or competent officials; the electors who gave the appointing power its authority; the local editors who knew of the incompetency of the authorities, and who failed to warn the ratepayers of it. The parents, guardians, and teachers of all those persons who failed to instruct them in the care that would be required of them at the polls, have all some share in bringing about the injury." It would be as impossible, as it would be absurd, for any tribunal to apportion and allot to each his proper share of the blame, and the law therefore stops at the first link in the chain of events, and looks only to the person who is the proximate cause of the injury: *Shearman* and *Redfield* on Negligence, (9).

Now the question whether a person has been negligent in any particular case, is a mingled one of law and fact. It includes two questions: 1st, whether some particular act has been performed or omitted? 2nd, whether the performance or omission of this act was a breach of some legal duty?

The first of these is, of course, a pure question of fact, the second, a pure question of law; but you will find it very difficult to reduce every case to these simple elements. In many cases the best way to arrive at the conclusion, as to whether there has or has not been negligence, is to put the question, was there such want of care as a man of ordinary prudence would use under similar circumstances? And this is of course the position in which the matter is generally sent to the jury. The amount of care required in an adult is not, nor can it be expected from a child. The amount of caution expected and required in handling explosives is materially different from that required in handling lumber, or other harmless material. A man carrying a loaded gun is expected to exercise more discretion than a man carrying a loaded cane. The burden of proof in an action of negligence always rests upon the party charging it, which is nearly always the plaintiff. It is not sufficient, as I have mentioned before, in order to

entitle a man to succeed, that he show he has suffered *some* injury, and sustained *some* damage, at the hands of the defendant; he must go further, and show that the act or omission out of which the damage arose, was a breach of some duty on the part of the defendant, and that some legal right of the plaintiff's has been invaded. The presumption always is, that the defendant has complied with all the obligations that may be imposed upon him, and should the reverse be the case, the onus of establishing that fact lies with the plaintiff; he must show what the defendant should have done, and that he neglected so to do; in addition to this he must connect the injury by shewing the damage to have arisen directly from such omission: *Blackmore* v. *Toronto Street Railway Co.*, 38 U. C. Q. B. 172; *Giles* v. *Great Western Railway Co.*, 36 U. C. Q. B. 360.

A plaintiff, however, is not bound to prove more than enough to raise a fair presumption of negligence and consequent injury to himself, and once this is done, if the defendant wishes to avoid the legal consequences, he must rebut this presumption, or prove that the plaintiff contributed by his own carelessness or negligence to the damage he has sustained. There are cases where the mere proof of the happening of the event is a strong presumption of negligence; for instance, a builder constructing a steamboat, instead of a ship-carpenter, would doubtless be sufficient to establish a presumption of negligence against the owners, and it would be for them to rebut this presumption by positive evidence negativing the negligence. The failure of any person to perform a duty, cast upon him by statute, and an accident happening would be evidence of negligence; a person cannot delegate a liability, in order to compel a person to seek redress against a third party, or an agent. For instance municipal corporations are bound by law to repair their highways and streets, they cannot relieve themselves from responsibility for an injury caused by non-repair, by showing that it has let out the work of repairing to a competent person. So a railway cannot escape the consequences of an accident, whereby

damage is caused, by showing they had employed the most competent and trustworthy servants they could find: *Virginia Southern R. W. Co.* v. *Sangon*, 15 Gratt. 230. There are several degrees of negligence, it might for example be divided into *slight*, *ordinary*, and *gross*, but these are, when closely analyzed, as one writer puts it, "theoretical and extremely difficult of application." In the case of *Wilson* v. *Brett*, 11 M. & W. 113, Ralfe, B., said he could see no difference between *negligence* and *gross* negligence, that it was the same thing, with a vituperative epithet; this opinion has been adopted in more recent cases by other able Judges. Also in pleading it is not necessary to aver gross negligence, for a general averment of negligence will be looked upon as meaning that degree of negligence necessary to sustain the pleading. Of course there are, and quite properly, distinctions drawn in the amount of negligence required in order to make different persons responsible; a greater degree of negligence would be required to be proved to make a gratuituous bailee of goods responsible for their loss, than would fix a bailee for hire with responsibility; a man who borrowed an old broken down horse would not be expected to take the same care of him as he would of a thoroughbred race-horse. We can then easily gather that there are always two things to be considered in settling in our minds the degree of care required in any given case, first, the thing to be taken care of, second, the danger to which it is or may be exposed. Now if you were entrusted with the care of half a ton of coal, and a dozen diamonds, (both of them by the way a form of carbon), a much different degree of thought and protection would be required in regard to each. It would doubtless be sufficient to place the coal in the coal bin in your yard, but you would hardly expect to escape the consequence of so rash an act if you placed the diamonds in the same place; you would no doubt be expected to exercise a somewhat greater degree of care in regard to the more valuable articles. I think we have now a pretty clear idea of what is, and what

is not negligence, and the principles which regulate the decision of the question; let us now take up some specified subjects and endeavour to derive some benefit by a little research into the boundaries set by established cases to the responsibility of individuals in each specified subject. Let us take, for example, the liability of a master for the negligence of his servant.

We may lay the foundation by noticing, that whatever a servant does in order to give effect to his master's wishes or commands, will be treated as the act of the master. A common instance of this is, where a servant is entrusted with his master's horse and carriage to go upon an errand for the master, if the servant while so pursuing the master's directions, even if he drive out of the way to any great extent, or actually disobey his master's strict injunctions, and even wilfully and wrongfully does what he has been ordered not to do, and causes injury to any one from his carelessness or negligence, the master will be liable for such injury; on the other hand, if the servant took the horse and carriage and went off on some frolic of his own and injured anyone, the master would not be liable. *Underhill*, in his valuable little work on *Torts*, lays down the rule very clearly. He puts it in this manner, "a person who puts another in his place, to do a class of acts in his absence, is answerable for the wrong of the person so intrusted, either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done; provided that what is done is not done from any caprice of the servant, but in the course of the employment": *Bayley* v. *Manchester, Sheff. & Lincoln R. Co.*, L. R. 7 C. P. 415.

So the principal question to be always first decided, when you are seeking to make a master responsible for a wrongful act committed by his servant is, was the wrongful act done in the course of the employment or outside of it? And, if the master claims exemption from liability for the tortious act of his servant, on the ground that, while apparently engaged in executing his orders, the servant

was in fact pursuing his own purpose, without regard to his master's business, and was acting wilfully and maliciously, this is ordinarily a question of fact for the jury: *Jackson* v. *The Second Avenue Ry. Co.*, 47 N. Y. 274. To illustrate this I will give you an American case, where I think the law was correctly stated. The plaintiff jumped upon the platform of a baggage car, on defendant's road, to ride to a place where the cars were being backed to make up a train. The defendant's rules forbade all persons, except certain employees riding on baggage cars, and directed baggage-men to rigidly enforce the rule. The plaintiff's evidence tended to show that the defendant's baggage-man ordered him off the car while it was in motion. A pile of wood was lying near the track, and the plaintiff told the baggage-man he could not get off on account of the wood, whereupon the baggage-man kicked him off. He fell against the wood, thence under the cars, and was seriously injured. In an action to recover damages for the injury sustained, it was held that the fact of the plaintiff being a trespasser was no defence, and that the foregoing facts, as proved, were sufficient to send the case to the jury. The court charged that, if the baggage-man acted "wilfully and maliciously towards the plaintiff outside of and in excess of his duty," the defendants would not be liable, and the Judge refused to qualify his charge, or to charge, that it was sufficient to exempt defendants from liability, that the act of the baggage-man was wilful; and the Court held that the learned Judge was right: *Round* v. *Delaware, Lackawana and West. Ry. Co.*, 64 N. Y. 129; *Higgins* v. *The Watervilet Turnpike Co.*, 46 N. Y. 23; *Sanford* v. *The Eighth Avenue Ry. Co.*, 23 N. Y. 343; *Lovett* v. *Salem, &c., Ry Co.*, 9 Allen, 557.

A case in our own Courts illustrates this principle. Upon a road, not a regular road allowance, but formed of land given by the owners thereof, for their general convenience, statute labor had been performed for some time under the regular pathmaster, and the public funds expended. It was held that the road must be considered

to be under the charge of the municipality, so far as to render them liable for its state of repair. The liability to repair, entends to overhanging trees liable to fall upon the road and cause damage to passers by. 1 *Hawkins*, P. C. T. 704. Where, therefore, the servants of the defendants in procuring materials on land adjoining the road for its repair, felled a tree, which in falling, lodged against another tree near the road, and being left there, afterwards fell and killed the plaintiff's wife, while passing along the road, upon these facts, the defendants were held liable. Gwynne, J., said, the defendants' servants, as well as the defendants, were liable; but in the event of the latter being held liable, they would have a remedy over against former: *Gilchrist* v. *The Corporation of the Township of Carden*, 26 C. P. 1; *Bush* v. *Steinman*, 1 B. & P. 408; *Mersey Docks Trustees* v. *Gibbs*, L. R. 1 H. L. 93.

Now we have seen that a part of the rule we are discussing, requires the servant to be acting in the course of his employment, it consequently is a general proposition of law, that a master is not responsible for the wrongful act of his servant, unless the act was done by the servant in the course of his employment.

This proposition has given rise to considerable discussion in a large number of cases, it is extremely difficult to draw the line, and say where and when a servant is, or is not, acting in the course of his employment; and to reconcile all the cases is next to impossible.

In one case it was in the course of the employment of a servant of the defendant, who was a brewer, to deliver with the defendant's horse and cart, the beer to his customers, and on his return, to collect the empty casks, for each of which he received a penny; the servant *without the defendant's permission*, taking out the horse and cart for a purpose entirely of his own, on his way back collected some empty casks, and while thus returning, by negligent driving he injured the plaintiff's cab; under these circumstances the defendant was held not liable. Mr. Justice *Lindley*, observing that the question of course

was, was the servant acting in the course of his employment? and decided that he was not, as the servant did not start out in his master's employ; and he thought the picking up the empty casks on his return could not affect the matter: *Rayner* v. *Mitchell*, L. R. 2 C. P. Div., 357.

In another case, the master entrusted his servant with his horse and carriage for a given purpose, and the servant, for some purpose of his own, drove it off in another direction, and in doing so drove over the plaintiff. The master was held not to be responsible, on the ground that the servant was not acting within the scope of his employment; for he had started upon a new and entirely independent journey, which had nothing to do with his connection with his master: *Storey* v. *Ashton*, L. R. 4, Q. B. 476.

But it has been held, that the servant going upon his master's business, and merely taking a longer road, such deviation would not be sufficient to take him out of his master's employment: *Mitchell* v. *Crassweller*, 17 Jur. 717.

Now the fact that the servant was, at the time of the injury, engaged in the service of the master is not conclusive as to the master's liability. The act causing injury must be within the scope of the authority which the servant had from the master, or which the master gave the servant reasonable cause to suppose he had, or which servants employed in the same capacity usually have.

In an American case where the plaintiff's slave was on board a steamboat as passenger, and a free negro employed on the boat injured him by *the discharge of a gun*, the owner of the boat, who was also the captain, was held not to be responsible: *McClenaghan* v. *Brock*, 5 Richardson's, L. R. 17, South Carolina.

An English case also illustrates the point very well. A van was standing in the street with a gig behind it, the defendant's carriage coming up, there was not room to pass, the defendant's driver got down from his box and took hold of the head of the horse attached to the van, causing him to move forward, by which movement a packing case on the van fell backwards, and broke the shafts of the gig;

it was held here that the defendant was not liable, as the driver was not acting within the scope of his authority when the accident occurred: *Lamb* v. *Palk*, 9 C. & P. 629.

But where a servant is allowed by the master to combine his own business with that of the master, or even to attend to both at substantially the same time, no very searching enquiry will be made as to which business the servant was engaged in at the particular time a third person was injured by his negligence; but the master will be held responsible, unless it clearly appears that the servant could not have been either directly or indirectly serving his master in the act, the negligent performance of which, caused the injury. In one case the defendant's agent was driving with his own horse and gig for the primary purpose of calling upon his own medical attendant, but proposed, though without his express consent, to stop on the way upon business of his principal, and before reaching the latter place, through his negligent driving, ran against and killed the plaintiff's horse, the defendant was held liable: *Patten* v. *Rea*, 2 C. B. N. S. 613.

It is quite possible for a servant to continue every moment serving his master, and yet so abuse the facilities afforded by his employment, as to carry out his own private ends, and to commit injuries wholly unconnected with his master's business.

The captain of a vessel may sail on one of the most direct and usual courses for his destination, and yet wantonly run down another. The engineer on a train may see cattle on the track ahead, and yet purposely run over them, and be every moment carrying out the ends of his master's business and serving him; but injury so committed would, in either case, be distinguished from acts performed in the master's service, and he would not be liable for such reckless and gratuitously injurious acts. Where the defendant's servant was driving a waggon, the plaintiff's son asked permission to ride. The servant said he might when he got up the hill, and the boy, having caught hold of the waggon between the fore and hind wheels, the servant

started the horses on a trot, and the boy was thrown down and badly injured by one of the wheels passing over him. It was held that the master was not liable, the act of the servant being wilful and wanton: *Wright* v. *Wilcox*, 19 Wend. 343.

In another case where the driver of an omnibus driving between P. and K., whilst plying between those places, wilfully and contrary to the express orders of his master pulled across the road in order to obstruct the progress of the plaintiff's omnibus.

In an action for negligence, it was held, that if the act of driving across to obstruct the plaintiff's omnibus was an act done in the best interest of the master, although a reckless driving on the servant's part, and was an act done by him in the course of his service, in doing what he considered would advance his master's business by obstructing a rival company, the master would be liable, but if the act was the act of the servant and done for some purpose of his own, the defendants were not responsible. Willes, J., said: "It is well-known that there is virtually no remedy whatever against the driver of an omnibus, and therefore it is necessary, that for injury resulting in an act done by him in the course of his master's service, the master should be responsible; for there must be a remedy against some person capable of paying damages to those injured by improper driving. The defendant's omnibus was driven before the omnibus of the plaintiff in order to obstruct it, it may be said the defendant had positive instructions to obstruct no omnibus whatever. In my opinion these instructions were immaterial. If disobeyed, the law casts upon the master a liability for the acts of the servant done in his employment; and the law is not so futile as to allow a master, by giving strict instructions to his servant, to discharge himself from liability. Therefore I consider it immaterial that the defendant directed the servant not to do the act;" and, to show the distinction, Blackburn, J., said: "If the jury came to the conclusion that he did it not to further his master's interests, not in the course of

his master's employment, but from private spite, with the object of injuring his enemy, who may be considered the rival driver, that would be out of the course of the employment: *Limpus* v. *The London Omnibus Co.*, 1 H. & C. 526.

From these cases we may gather that there is no rule of law that the master is *not* liable for the wilful and wrongful acts of his servants, and that there are many cases in which the master must be held liable.

The true question is, whether the act is done in the course of the employment; if you find that it is, no matter if the servant has had instructions not to do the particular act, the master will be responsible; but if the wrongful act has been committed by the servant apart and distinct from his employment, then he who brings an action against the master cannot succeed.

In *Williams* v. *Jones*, 3 H. & C. 256, it appeared that the defendant bought some boards from the plaintiff, a timber merchant, and at the defendant's request the plaintiff gave him permission to use his shed for the purpose of making a sign-board. The defendant employed D., a carpenter, to make a sign-board at a fixed price, and D. used the shed for the purpose with the plaintiff's knowledge. D., while so working, lighted a pipe from a match with a shaving, which he accidentally dropped, and the shed was burnt down. Upon an action brought against the defendant it was held he was not liable, for that the act of D. was not a negligent act within the scope of his authority. I cannot better close my lecture than by making a quotation from the judgment of Martin B., in this case, as illustrating the various degrees of negligence of the several parties. He says: "We are not aware of any authority which shows that any contract exists between a person so occupying a shed under a license, beyond that which the law would itself impose in respect of negligence; and we think, therefore, that the only duty which was imposed upon the defendant was, that there should not be negligence in the use of the shed; and if in the course of the

employment D., the carpenter, had been guilty of any negligence which could be at all applicable to the employment in which he was engaged, it may be that the defendant would be responsible; but we think, upon the best consideration that we can give to the case, it is impossible to hold that a man who employs another for a sum of money to do a job is to be responsible because that man does a very natural and common act, and which the jury have found to be a negligent act; it is impossible to say that that casts any liability upon the employer. If the facts were correctly found by the verdict, Davis himself would be liable and responsible for this negligence, for he would have acted negligently when on the premises of another person, towards whom he was at all events bound to use reasonable care for the purpose of protecting the premises from injury, and therefore the action would lie against him."

A reference to the cases above mentioned, and innumerable others that are cited in the leading text books, will amply support the remark I made a few moments ago, that it is extremely difficult to draw the line, and say where, and where not, a servant can be said to be acting in the course of his master's employment. I will now leave the subject in the hope that the few cases I have cited, may enable you to extend your individual researches.
